APPENDIX.

Since Sections 7 and 9 of Art. II of the Gainesville charter are referred to in illustrating the point that Sec. 3 of Art. II does not authorize the issuance of the alleged warrants, said Sections 7 and 9 are here copied, as follows:

"Sec. 7. To Regulate Street and all Railway Companies. The City of Gainesville shall have the power by ordinance or otherwise to regulate the speed of engines, locomotives, car, street cars and railway trains within the corporate limits of Gainesville, and to require all railways and street railway companies to keep the streets over which their line or lines may run properly drained, and to light the same wherever deemed by the city necessary, and to require all railway and street railway companies to construct and keep in repair from curb to curb, bridges and crossing over all the ditches dug by said companies, or natural drains, waterways and openings over which the lines of said companies are run, and to construct and maintain drain and culverts where crossed by any line of said railways on all streets over which they run; to direct and control the laying and construction of railroad tracks, turnouts and switches, and to regulate the grade of same, and to require them to conform to the grade of the streets of said city as they may be or are now established, and that said tracks, turnouts and switches be so constructed and laid out as to interfere as little as possible with the ordinary travel in the use of the streets.

"Sec. 9. Lien for Improvement. The City of Gainesville shall have power by ordinance or otherwise to require all railway companies to pay the cost of grading, paving, repairing or repaving or

otherwise improving that part of the street or streets or intersections thereof within the city used or occupied by said companies and such cost shall be a lien upon the property and franchises of such companies. The portion of the street occupied by a street railway company shall be deemed to be the space between its tracks and twelve inches on the outside of its rails, and all space between its double tracks, turnouts and switches."

The charter, except some amendments which it is not necessary to now notice, is found in the Special Laws of the Thirty-first Texas Legislature approved March 17th, 1909, and is set forth in 14th Gammel's Laws of Texas, pages 501 to 543 of the laws of that year. Gammel's laws are not differently paged.

FILED
MAR 6 1928
CHARLES ELMORE CROPL
CLER

No. 433

In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

BRIEF FOR SOUTHERN SURETY COMPANY ONE OF THE RESPONDENTS

J. L. PARRISH,
of Des Moines, Iowa,
Attorney for Respondent.

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Insofar as the brief of petitioner and that of respondent H. O. Head, executor, attacks the validity of the warrants in question, and supports the proposition that the suit in its entirety and not the separable controversy only was removed to the United States District Court, Southern Surety Company, a respondent, adopts the same in its behalf. Insofar as the brief of H. O. Head, respondent, attacks the right of the city to recover, or in any event to recover against either respondent, said respondent adopts the brief of its said co-respondent, H. O. Head, executor.

With respect to the brief filed in behalf of the City of Gainesville, petitioner, this respondent makes the following comments:

On page 5 reference is made to some understanding without a statement as to what parties participated in reaching such understanding. It might be inferred that H. W. Head was a party to this understanding, but there is no evidence whatever that he participated in or even had any knowledge of same until his activities as escrow agent or financier were invoked later.

On page 6 of the brief the statement is made that this respondent guaranteed two obligations for H. W. Head. This statement is contradicted by the record which discloses that the only obligations executed by this respondent in behalf of H. W. Head related to an agreement dated September 10, 1920, this respondent's obilgations being dated September 20, 1920. (R. page 13-16-17).

In some instances reference is made in the brief to Southern Surety Company when obviously Southern Construction Company is intended.

H. W. Head fully discharged his obligation and the judgment in favor of himself and his surety should be affirmed.

Head's undertaking appears in full in the record and is correctly quoted on pages 5-6 of petitioner's brief. After referring to the preceding events and the intention of the parties with respect to the issuance of the warrants, and the agreement to indemnify the city to the extent named, it is recited:

> "None of said money will be paid or credited to Southern Const. Co., except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged."

The undisputed record shows in the most definite and certain manner that H. W. Head lived up to the letter of his agreement and did exactly what he promised to do. In due course, the city council of the city of Gainesville audited and allowed claims of the Southern Construction Company in varying amounts, being the same amounts as the warrants turned over by Head to the Construction Company. (R., p. 167, et. seq.). These proceedings by the council were certified under the signature of the mayor and the city secretary and the corporate seal. They were further supported by the individual affidavits of the mayor, aldermen and city secretary to the effect that the statements recited in the councilmanic proceedings were true; that the material had been furnished and the work had been done, and same had been inspected and accepted and found to be in accordance with the contract and worth the price agreed to be paid therefor. This procedure was followed with respect to each warrant in question. (R., p. 252, et. seq.)

It is plainly apparent that these entire proceedings came into the hands of H. W. Head before a single warrant was surrendered. The money for the warrants was collected through H. W. Head by means of drafts drawn by him on the Brown-Crummer Investment Company. The warrants, the certified record of the councilmanic procedure and the cumulative verifying affidavits were attached, all of which discloses in the clearest possible manner that

this record was furnished Head and on the faith of it he made the drafts, attached same, and forwarded the drafts for collection. (R., p. 191, et. seq. and p. 258, et. seq.).

H. W. Head agreed that he would not pay or credit the Southern Construction Company except in such amounts as were shown to be due under the signature of the mayor, and that when such amounts equaled ten thousand dollars in one case and thirty-seven thousand dollars in the other case, his obligation should be discharged. The record shows beyond any possibility of debate that he was furnished a statement under the signature of the mayor, and amply supported otherwise, for that matter, that the amounts of warrants delivered by him represented amounts so shown to be due and his obligations were at an end.

If the record referred to had been wholly fabricated, there is not a suggestion of any knowledge of that fact on the part of H. W. Head, and the city should not be heard to assert a liability against him on account of actions taken by him by virtue of the very authority upon which he must depend and in obedience to which he agreed to act.

City of Laredo v. Frishmuth, 196 S. W., 190.
City of Marshall v. Elgin, 143 S. W., 670.
Colonial, etc., v. U. S. Mort. Co., 45 S. W., 623.
Halsell v. Ferguson, 202 S. W., 317, (Tex. Sup.)

This respondent respectfully prays that as to it and its co-respondent, the judgment of the trial court be in all things affirmed.

J. L. PARRISH,
Attorney for Respondent
Southern Surety Company.